Avecor, Inc. *and* Oil, Chemical and Atomic Workers International Union. Cases 10–CA–22645, 10–CA–22886, and 10–RC–13492

September 30, 1992

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 22, 1989, the National Labor Relations Board issued its Decision and Order[1] finding that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act. The violations found included discharging two employees, coercively interrogating employees, threatening stricter rule enforcement, promising benefits, and threatening plant closure. The Board set aside the election held in Case 10–RC–13492 and issued a bargaining order under the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. On April 26, 1991, the court enforced all but one of the Board's unfair labor practice findings and remanded the case to the Board for consideration of two issues: Whether a *Gissel* bargaining order is the appropriate remedy, and whether two disputed employees are ''office clerical'' employees who are excluded from the stipulated bargaining unit.[2]

On August 14, 1991, the Board advised the parties that it accepted the remand and invited statements of position. Thereafter, the Respondent and the General Counsel filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

I. THE GISSEL ORDER

We have considered the original decision and the record in light of the court's decision, and the Respondent's and General Counsel's statements of position. We accept the court's decision as the law of the case and have decided to modify the Board's original decision by deleting the *Gissel* bargaining order[3] and directing that a second election be held.

The judge found that the Respondent committed various ''hallmark'' violations.[4] These included the discharges of employees Jeffery Tidwell and Leroy Hamby. He characterized this as ''an unlawful discharge of roughly 6 percent of the unit'' that was ''likely to have a substantial and lasting impact on employee free choice.''[5] He also gave considerable weight to Manager of Liquid Production Joe Ingram's statement to Hamby that the Respondent might close its doors if the Union won, and to the fact that many of the violations were especially coercive because they were committed by upper level management officials.[6] Accordingly, the judge concluded, and the Board affirmed, that a *Gissel* bargaining order was warranted.

On review, the court vacated the finding that Hamby's discharge was unlawful.[7] It also suggested that Ingram's isolated remark to Hamby was less heinous than the judge painted it.[8] As a result of these findings, the court stated that ''a significant question is presented whether the remaining unfair labor practices in this case are serious enough, or pervasive enough, to have the tendency to undermine majority strength and prevent the holding of a fair rerun election.''[9] The court therefore remanded the proceeding to

[1] 296 NLRB 727.

[2] *Avecor, Inc. v. NLRB*, 931 F.2d 924 (1991), cert. denied 112 S.Ct. 912 (Jan. 13, 1992).

[3] In addition, we shall delete from the Order those provisions in the original Order regarding conduct that the Board found to constitute unfair labor practices, but which the court found not to be unlawful.

[4] 296 NLRB 749.

[5] Id.

[6] Id.

[7] In finding that the General Counsel made a prima facie showing that Hamby was discharged on the basis of his union activities in violation of the Act, and on the Respondent's reliance on ''unsubstantiated reasons'' for the discharge, the judge expressly relied on the small-plant doctrine as evidence of the Respondent's knowledge of Hamby's union activities. Id. at 742. The court, however, set aside the finding that Hamby's discharge violated the Act, because ''Hamby's activity was isolated, brief, and not especially public,'' and ''because there [was] no substantial evidence that Avecor knew of Hamby's union activity.'' 931 F.2d at 931.

The Board affirmed the judge's finding that Hamby's discharge was also conduct which interfered with the election. Based on that objectionable conduct and the other unfair labor practices that occurred during the critical period but were not specifically raised in the Union's objections, the judge concluded that the election must be set aside. The court, though not enforcing the finding that Hamby's discharge was unlawful, declined to vacate the Board's finding that the election must be set aside. Id. at 934. Even though the court declined enforcement of the Hamby discharge, we conclude nonetheless that the remaining unfair labor practices, under *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988), justify setting aside the election. Matters litigated in an unfair labor practice case that is consolidated with a representation case can form the basis for setting aside an election even though those matters were not raised by the objections. There is no contention before us that the election was not properly set aside.

[8] 931 F.2d at 936. Ingram's statement occurred in a conversation in which Hamby asked him what he thought about the Union. Ingram replied that ''the Union would cause the company to close the doors and that it would do no good.'' 296 NLRB at 730. The court deferred to the judge's conclusion that Ingram's remark violated the Act, but it found that ''[t]he evidence shows that one supervisor, on one occasion, in response to a direct question, in the hearing of one employee, said that the plant would close if the union were elected.'' 931 F.2d at 932. The court went on to conclude that these facts ''fall short of the ALJ's conclusion that Avecor had committed a 'hallmark' violation of the NLRA.'' Id.

[9] 931 F.2d at 936, citing *Pedros Inc. v. NLRB*, 652 F.2d 1005, 1011 (D.C. Cir. 1981).

the Board to, inter alia, ''consider whether the remaining violations justify a bargaining order.''[10]

The court's findings regarding Hamby's discharge and Ingram's statement have effectively removed two of the three ''hallmark'' violations the judge and the Board found and relied on to conclude that a bargaining order was appropriate, the other being Tidwell's discharge in violation of Section 8(a)(3) and (1) of the Act.

In deciding whether a *Gissel* bargaining order is still warranted, we must take account of the high standard imposed by the court in this case. The court, finding that the judge's analysis amounted to ''conclusory statements that a fair rerun election cannot be held,''[11] stated that:

> The need for a real demonstration of the inadequacy of alternative remedies is particularly acute, of course, in a case such as the present one, where the Board relies on a weakly supported inference for its belief that the unfair practices undermined the election that immediately followed them. If the basis for thinking that the unfair labor practices affected that election is weak, a claim that they would fatally contaminate a new election months or years later is even weaker.

The court also directed the Board to take account of employee turnover up to the time of any new bargaining order if the Board found one otherwise appropriate in light of the court's findings.[12] In this regard, the court required a determination whether the Respondent's

> actions in the spring of 1987 left so lasting an imprint that a fair rerun election cannot be assured; or whether, to the contrary, ''changes in the Company's work force have made a bargaining order now inappropriate, even if one might have been appropriate at some earlier time.''[13]

In view of the court's decision, which we are bound to accept as the law of the case, we cannot conclude that at this time the remaining unfair labor practices are so pervasive, severe, or lingering as to render unlikely the holding of a fair second election. Thus, the court has effectively left only the one discharge, the interrogations, the threats of stricter rule enforcement, the promises of benefits, and the one threat of plant closing which the court found was not a hallmark violation. While these unfair labor practices are indeed serious, we are now constrained to conclude that they do not warrant imposition of a *Gissel* bargaining order. Accordingly, in light of the court's decision, we conclude that a *Gissel* bargaining order is not required in this case. We shall delete the corresponding language from our original order, reopen the representation proceeding, and direct that a second election be held.[14]

II. THE UNIT PLACEMENT ISSUE

As further directed by the court, we must review the order entry clerk and lab secretary positions and determine whether these positions are included in the unit.

The judge found that Order Entry Clerk Lisa McWaters and Lab Secretary Diane Byrum were office clerical employees and therefore were excluded from the collective-bargaining unit. The Board adopted the judge's finding regarding McWaters, but found it unnecessary to pass on Byrum's status as her presence in the unit would not have deprived the union of its majority support.[15]

We agree with the court that our role in determining the unit placement of the order entry clerk and the lab secretary involves interpreting the parties' stipulation. Where the parties have stipulated that a particular unit is appropriate, ''[T]he Board's function is to ascertain the parties' intent with regard to the disputed employee and then to determine whether such intent is inconsistent with any statutory provision or established Board policy.''[16] When the parties' intent is clear, the Board will hold them to their agreement.[17] If the parties' intent is unclear, however, the Board will utilize community of interest principles to aid in resolving the unit placement question. *Viacom Cablevision of San Francisco*, 268 NLRB 633 (1984).

The stipulation here reveals that the parties' intent was clearly to include plant clericals in the unit and exclude office clericals. But this does not tell us whether McWaters and Byrum were in fact plant clericals or office clericals. On that score, the stipulation is unhelpful. Accordingly, we shall reexamine their job functions.

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[10] 931 F.2d at 936.

[11] 931 F.2d at 938, citing *St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 148 (D.C. Cir. 1989).

[12] Id. at 937.

[13] Id., citing *NLRB v. Pace Oldsmobile*, 681 F.2d 99, 102 (2d Cir. 1982) (per curiam). In light of our decision, we shall not remand to the judge for an examination of employee turnover.

[14] See *Philips Industries*, 295 NLRB 717 (1989); *Almet, Inc.*, 305 NLRB 625 (1991).

[15] 296 NLRB 727 fn. 3. The court was concerned about the Board's not passing on the lab secretary's position because it made the unit placement of a disputed category uncertain. The Board, however, has a procedure for the resolution of such unit placement issues after the election that involves the filing of a unit clarification petition. It is thus not unusual for the Board to leave unresolved the status of an employee in a disputed classification whose vote is not determinative of the election results. That employee can vote subject to challenge. When a majority of the ballots are then cast for the union, the Board will certify the union. If, at that time, the status of the disputed voter cannot be resolved by the parties, the Board will process a unit clarification petition to determine the placement or status of the contested individual. See *Kirkhill Rubber Co.*, 306 NLRB 559 (1992).

[16] *Tribune Co.*, 190 NLRB 398, 399 (1971).

[17] *Business Records Corp.*, 300 NLRB 708 (1990); *White Cloud Products*, 214 NLRB 516, 517 (1974).

The judge found that Order Entry Clerk Lisa McWaters worked in the Respondent's main office where the office clerical employees worked, in an area adjacent to the office of General Manager Willoughby. Willoughby directly supervised her.

McWaters received the product orders that the customers telephoned in, and prepared the paperwork using office equipment and a digital computer. She also generated shipping paperwork for orders and supplied order information to the production manager and shipping information to the shipping department. She was hourly paid, but did not punch a timeclock. She worked 8-hour days and 40-hour weeks, the same as the office clerical employees, and was not affected by the Respondent's change to a 10-hour shift which affected most unit employees. Her contact with unit employees was limited to incidental contact while taking paperwork into the production area about four or five times a day. She enjoyed the same fringe benefits granted all of the Respondent's employees and had access to a production employee breakroom, as well as access to an office clerical coffee facility.

The judge found that Lab Secretary Diane Byrum worked in the lab manager's office adjacent to the main office. Using a computer terminal and regular office equipment, Byrum produced paperwork for the lab as well as plant production reports. Among other things, she prepared paperwork associated with the shipping of lab samples and liquid-department requisitions. She spent an estimated 25 percent of her time out of her primary work location, allegedly in direct contact with lab or production employees. Byrum was supervised by Lab Manager Pollard, who reports to Senior Vice President McLean. On at least one occasion Byrum typed a memo from Pollard to McLean describing the unsatisfactory conduct of employee Tidwell. Like McWaters, Byrum was hourly paid, received the same fringe benefits as the unit and nonunit employees, and worked the same hours as office clericals.

We find that McWaters and Byrum are office clerical employees within the meaning of the stipulation because their job functions and working conditions are more like those of office clericals than of plant clericals. Among other things, McWaters and/or Byrum were: (1) principally performing work typically accomplished by office clerical employees, such as preparing shipping papers (McWaters, Byrum) and doing typing (Byrum), that we find to be incidental to, and not an integral part of, the production process; (2) working in the same office as (McWaters) or in an office adjacent to (Byrum) office clerical employees and having limited contact with production employees; (3) working the same hours as office employees, which were different from the production employees, and, unlike the production employees, being unaffected by a change to 10-hour shifts; (4) not receiving the 40-cent-per-hour wage increase granted to the production and maintenance unit employees; and 95) regularly using equipment typically employed by office clericals. Accordingly, we find that the order entry clerk and lab secretary positions are office clerical positions and therefore are excluded from the unit.

As directed by the court, we address the applicability of *Columbia Textile Services*, 293 NLRB 1034 (1989), enfd. 917 F.2d 62 (D.C. Cir. 1990), which also presented the question whether two employees were office or plant clericals. There, the Board concluded that the two disputed employees should be included in the unit as plant clericals.

Columbia Textile is distinguishable, however, from this case. The Board in *Columbia Textile* found that the two employees had more than minimal contact with the unit employees and that their job duties were functionally integrated into the production process. We cannot make those same findings here. McWaters' and Byrum's paperwork was not directly related to the production process, and their duties were not functionally integrated into that process. Their contact with the unit employees was no more than minimal. Further, although the two employees in *Columbia Textile* were supposedly supervised by the office clerical supervisor, the Board relied on evidence that one of the disputed employees was actually supervised by the plant superintendent, and that her job-related questions were directed to that superintendent and others in the plant.[18] We also note that, unlike in *Columbia Textile*, the two disputed employees in the instant case worked the same hours as the office clericals; were not affected by the shift change that affected the production and maintenance unit employees; and did not receive a 40-cent-per-hour increase that was granted the production and maintenance unit employees. Accordingly, we conclude that *Columbia Textile* is distinguishable.[19]

ORDER

The National Labor Relations Board orders that the Respondent, Avecor, Inc., Vonore, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees because they join, support, or assist Oil, Chemical and Atomic Workers International Union in

[18] Id. at 1038.

[19] See *Jakel Motors*, 288 NLRB 730, 742 (Inama) (1988), enfd. 875 F.2d 644 (7th Cir. 1989); *Cincinnati Bronze*, 286 NLRB 39, 44 (Frakes) (1987); *Continuous Curve Contact Lenses*, 236 NLRB 1330 (1978); *Conchemco Inc.*, 182 NLRB 125 (Serio) (1970). Although none of these cases is ''on all fours'' factually with the instant case, each shares with the instant case certain fundamental considerations that are pertinent to the question whether the disputed positions are office clerical positions excluded from the stipulated unit.

order to discourage the membership in, support, or assistance of the Union by its other employees.

(b) Implying to employees that it would consider granting them wage increases to induce them to forgo their union activity.

(c) Threatening employees that it will close its doors if they select the Union to represent them.

(d) Interrogating its employees concerning their union membership, activities, and desires.

(e) Threatening its employees with more strict rule enforcement and the refusal to grant future favors if they select the Union to represent them.

(f) Promising its employees more raises and benefits if they do not select the Union to represent them.

(g) Offering employees money or other benefits to induce them to seek the return of their union authorization cards.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jeffery Tidwell immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge of Jeffery Tidwell and notify him in writing that this has been done and that the discharge will not be used against him in any way.[20]

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Vonore, Tennessee place of business copies of the attached notice marked ''Appendix.''[21] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 10–RC–13492 is reopened and that all prior proceedings held thereunder are reinstated.

IT IS FURTHER ORDERED that Case 10–RC–13492 is severed and remanded to the Regional Director for Region 10 for the purpose of conducting a second election as directed below.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES OR MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT imply to our employees that we will consider granting them a wage increase to induce them to forgo their union activity on behalf of Oil, Chemical and Atomic Workers International Union.

WE WILL NOT threaten employees that we will close our doors if they select the Union to represent them.

WE WILL NOT interrogate our employees concerning their union membership activities and desires.

WE WILL NOT threaten our employees with more strict enforcement of rules and the refusal to grant future favors if they select the Union to represent them.

WE WILL NOT promise our employees more raises and benefits if they do not select the Union to represent them.

WE WILL NOT offer employees money or other benefits to secure the return of their union authorization cards.

WE WILL NOT discharge or otherwise discriminate against employees because of their union activities and sympathies.

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[20] Pursuant to an unpublished Revised Judgment of the United States Court of Appeals for the District of Columbia Circuit (Docket No. 89–1643), the Respondent may issue Tidwell a retroactive letter of reprimand for his behavior on April 24, in which he ''lost his cool'' on the job. See 296 NLRB at 739.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

WE WILL NOT in any other manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jeffery Tidwell immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and we will make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharge of Jeffery Tidwell and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel action against him.

AVECOR, INC.